UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARCEL G. LAROSE, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 97-231-P-C***
	)	
MARVIN T. RUNYON, United States Postmaster General,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendant, Marvin T. Runyon, United States Postmaster General, moves this court to dismiss the plaintiff's amended complaint or, in the alternative, to grant him summary judgment on all claims raised in the amended complaint, which arises out of allegations of employment discrimination and unlawful retaliation. I recommend that the court grant the motion in part and deny it in part.

I. Applicable Legal Standards

The defendant has moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and (6). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the

purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such

that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Analysis

Counts I and II of the amended complaint (Docket No. 2) allege violations of 42 U.S.C. § 2000e-5 *et seq.* ("Title VII"), specifically disparate treatment, harassment and retaliation, and 29 U.S.C. § 791 *et seq.* (the Rehabilitation Act), specifically discrimination on the basis of a disability, all arising out of the plaintiff's employment by the United States Postal Service. Amended Complaint ¶¶ 42-43, 49-51. The alleged violations of Title VII are apparently based on discrimination due to the plaintiff's French-Canadian national origin. *Id.* ¶ 11. The remaining counts of the amended complaint raise state-law claims of intentional infliction of emotional distress (Count III), negligent infliction of emotional distress (Count IV), unjust enrichment (Count V) and

breach of contract (Count VI)

A. The Federal Claims

The amended complaint alleges that three separate charges of employment discrimination were filed with the Equal Employment Opportunity Commission ("EEOC") by the plaintiff, each of which is cited as an instance of necessary compliance with 42 U.S.C. § 2000e-5(f)(3) as a condition precedent to this action, one filed on February 19, 1991, one filed on December 12, 1995 and one filed on April 2, 1996. Amended Complaint ¶ 5. The initial complaint in this action was filed on July 7, 1997.

The defendant moves to dismiss all claims based on the December 12, 1995 EEOC filing, a charge upon which the EEOC issued its final decision on March 20, 1997, *id*., on the grounds that the complaint was filed more than 90 days after the final decision was received by the plaintiff's counsel, in violation of 42 U.S.C. § 2000e-16(c). The final decision was delivered to the plaintiff's current counsel on March 24, 1997. Declaration of Michael McDonald (Docket No. 10) ¶ 3. The plaintiff does not dispute this fact, but argues that the limitations period established by the statute should be equitably tolled because he himself did not receive a copy of the decision until April 12, 1997, some 85 days before the complaint was filed, and that the fact that he did not receive a copy of the decision until that date was an action of the EEOC that misled him. Plaintiff's Opposition to Defendant's Motion to Dismiss (Docket No. 8) ("Plaintiff's Opposition") at 3-4. He relies on *Brezovski v. United States Postal Serv*., 905 F.2d 334 (10th Cir. 1990) in support of his position.

Section 2000e-16(c) provides, in relevant part:

> Within 90 days of receipt of notice of final action taken by a department,

> agency, or unit [of government] referred to in subsection (a) of this section, or by the Equal Opportunity Employment Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

A party is deemed to have received notice under this provision when his attorney has received notice. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 93 (1990). Equitable tolling of this statute of limitations is available when a claimant has filed a defective pleading during the statutory period or when a claimant has been induced or tricked by his adversary into allowing the filing deadline to pass. *Id.* at 96. The principles of equitable tolling do not extend to "a garden variety claim of excusable neglect." *Id.*

Here, the plaintiff does not allege that the defendant "actively misled him and that he relied on the (mis)conduct to his detriment" in failing to file this action within 90 days of the receipt of notice of the EEOC's action. *Jensen v. Frank*, 912 F.2d 517, 521 (1st Cir. 1990). His assertion that he was misled, although represented throughout by counsel, as to the date before which he was required to file this action by the fact that he only received a copy of the decision from the EEOC some three weeks after his lawyer did so, establishes nothing more than a "garden variety claim of excusable neglect" by his attorney, and the defendant is therefore entitled to dismissal of all claims raised in this action based on the December 1995 EEOC claim.[1] *Brezovski*, upon which the plaintiff

[1] The plaintiff also argues that his failure to comply with the statute of limitations should be excused because the courts have a "special obligation to provide a forum for the resolution of civil rights claims." Plaintiff's Opposition at 4. This argument, carried to its logical conclusion, would mean that the statute of limitations established by section 2000e-16, which applies only to "civil (continued...)

relies, does not support a different result. In that case, the Tenth Circuit held that language in the EEOC's notice of its final decision could reasonably be read to require a plaintiff to name the wrong party as a defendant, which the plaintiff did within the applicable time limit. *Brezovski*, 905 F.2d at 335, 337. This was sufficiently misleading to toll the statutory limitations period under the circumstances. *Id.* at 337. Here, there was no timely filing at all, and the plaintiff cites no misleading language from the notice itself. *Brezovski* is easily distinguishable from the facts of this case.

It is difficult if not impossible to discern from the amended complaint which allegations were raised in the December 1995 EEOC claim. The defendant has provided a list of specific paragraphs in the amended complaint that, he asserts, "repeat the untimely allegations from the original Complaint," Appendix to Defendant's Reply to Plaintiff's Opposition to the Motion to Dismiss ("Defendant's Reply") (Docket No. 9), at 7-8, upon which I will rely in discussing the remaining allegations in Counts I and II of the amended complaint. The original complaint did not refer to the two other EEOC complaints, Complaint (Docket No. 1), and it is reasonable to conclude therefore that all allegations included in the original complaint arise out of the December 1995 EEOC claim. However, that conclusion does not necessarily mean that all allegations in the amended complaint that appear to repeat those in the initial complaint must also be dismissed, a point which will be addressed in more detail later in this recommended decision.

The defendant argues that the remaining allegations in Counts I and II must be dismissed because the plaintiff has failed to set forth in his amended complaint sufficient factual allegations

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[1](...continued)
rights claims," could never be enforced. Merely to state the practical effect of the argument is to demonstrate its invalidity.

to support each element necessary to recover under Title VII or the Rehabilitation Act. In the First Circuit, "Rule 12(b)(6) is not entirely a toothless tiger." *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). A plaintiff must set forth in his complaint "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory." *Id*., quoting *Gooley v. Mobil Oil Corp*., 851 F.2d 513, 514 (1st Cir. 1988). The First Circuit has "consistently required plaintiffs to outline facts sufficient to convey specific instances of unlawful discrimination." *Id.* The complaint must be "anchored in a bed of facts, not allowed to float freely on a sea of bombast." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). "[A] court assessing a claim's sufficiency has no obligation to take matters on blind faith." *Id.*

The amended complaint in Count I alleges disparate treatment, creation of a hostile work environment, harassment, retaliation and discrimination based on disability. Amended Complaint ¶¶ 41-43. This is the only count that invokes the Rehabilitation Act. The plaintiff alleges that he "is a person suffering from a physical handicap," *id.* ¶ 9, and that he has a handicap "as that term is defined in . . . the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*," *id*. ¶ 3. The amended complaint does not further mention or describe the handicap.

A handicapped individual is defined by the Rehabilitation Act as one who (i) has a physical or mental impairment which substantially limits one or more of his major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B). In order to determine whether a person is handicapped under the Rehabilitation Act, a court must determine whether the individual has a physical or mental impairment and then whether the impairment substantially limits one or more of his major life activities. *Gardiner v. Mercyhurst*

College, 942 F. Supp. 1050, 1052-53 (W. D. Pa. 1995). "Major life activities" is defined as "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1614.203(a)(3). While it asserts in conclusory fashion that the plaintiff is handicapped, the amended complaint asserts no factual basis that could lead to a determination that he was substantially limited in any of these major life activities, and therefore his Rehabilitation Act claims must be dismissed, since the court cannot find or infer that he is in fact handicapped under the Act. *Gardiner*, 942 F. Supp. at 1053; *see also Venclauskas v. Connecticut Dep't of Public Safety*, 921 F. Supp. 78, 81 (D. Conn. 1995).

In addition, a required element of a claim under the Rehabilitation Act is a showing that the employee's handicap is the sole reason for an employer's challenged action. *Norcross v. Sneed*, 755 F.2d 113, 117 n.5 (8th Cir. 1985). The failure of the amended complaint to allege that the plaintiff's handicap was the basis for any of the defendant's alleged unlawful actions also requires dismissal for failure to state a claim for violation of the Rehabilitation Act. *Assa'ad-Faltas v. Commonwealth of Virginia*, 738 F. Supp. 982, 987 (E. D. Va. 1989). *See also Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993). To the extent that Count I raises claims under the Rehabilitation Act, those claims must be dismissed.

With regard to the claims raised in Count I under Title VII, this analysis will be confined to the claims of creation of a hostile work environment and disparate treatment,[2] because the plaintiff's claims for unlawful retaliation under Title VII are also set forth in Count II and will therefore be

[2] Although the amended complaint also alleges "harassment" as a basis for recovery under Title VII, harassment must be presented as either hostile environment or quid pro quo discrimination in working conditions under Title VII. Allegations of "harassment," standing alone, do not constitute a separate basis for recovery under Title VII. *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996) (Title VII does not prohibit harassment as such but does prohibit discrimination).

discussed separately below. Assuming *arguendo* that the amended complaint's allegation that the plaintiff complained of discrimination based on his national origin before January 3, 1990, Amended Complaint ¶ 11, is sufficient to establish the discriminatory basis for events alleged to have occurred thereafter, *id*. ¶¶ 12-23, the plaintiff must still, in order to adequately allege a Title VII claim of disparate treatment, assert that non-minority employees similarly situated or qualified were granted favorable treatment or benefits. *Johnson v. General Elec.*, 840 F.2d 132, 138 (1st Cir. 1988).

The amended complaint does not satisfy this basic requirement. It does allege that the plaintiff's Quality Step Increase was delayed in April 1990, unlike those of other employees "who had not made an EEO complaint." Amended Complaint ¶ 13. It alleges that the plaintiff's request for safety glasses in August 1990 was subjected to "additional approval requirements not required of other employees." *Id*. ¶ 15. Finally, it alleges that the plaintiff's Official Personnel Folder was treated differently from those of other employees, both in violation of United States Postal Service regulations requiring a written record of removal of the folder and because the plaintiff's folder was present during a meeting to select a candidate for a particular position while the files of other applicants were not. *Id*. ¶¶ 21-23. The first instance alleges only a possible basis for a claim of retaliation. Only the second instance can be construed to allege that other employees received a benefit or favorable treatment that the plaintiff did not receive. In each instance, the amended complaint fails to allege that the other employees to whom the allegations refer were similarly situated with the plaintiff or that their national origin differed from that of the plaintiff. Accordingly, the claims of disparate treatment raised in Count I of the amended complaint must be dismissed.

A claim of hostile environment discrimination under Title VII will survive a motion to dismiss when it alleges that the plaintiff's workplace was permeated with discriminatory intimidation

that was sufficiently severe or pervasive to alter the conditions of the work environment and that a specific basis exists for imputing the conduct that created the hostile environment to the employer. *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (Title IX claim; elements identical to Title VII claim). The complaint must include allegations that the employee belongs to a protected class and that he was subjected to unwelcome harassment based on that status. *Hodges v. Gellerstedt*, 833 F. Supp. 898, 901 (M. D. Fla. 1993).

Here, the amended complaint alleges that the plaintiff "complained to management" in 1990 "concerning ongoing verbal abuse by an acting supervisor/co-worker," Amended Complaint ¶ 16, and that "[t]he USPS' unceasing harassment and retaliatory acts against Mr. Larose have created a hostile work environment for him," *id.* ¶ 41. This does not meet the minimum pleading requirements for a hostile environment discrimination claim. There is no allegation that the verbal abuse in 1990 was based on the plaintifff's national origin or that the harassment was so pervasive that it altered the conditions of the plaintiff's working environment. The conclusory allegation in paragraph 41 of the amended complaint will not serve this purpose. *See Aulson,* 83 F.3d at 3 (court evaluating Rule 12(b)(6) motion should not rely on bald assertions or unsupportable conclusions). "It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes." *Dartmouth Review*, 889 F.2d at 16. That level is not reached in the amended complaint.

Although some of the allegations in Count I of the amended complaint mention retaliation, the plaintiff has stated that Count I raises a claim of handicap discrimination and Count II raises a claim of retaliation. Plaintiff's Opposition at 8. Count II incorporates all of the allegations in Count

I by reference. Amended Complaint ¶ 45. Because the amended complaint fails to state a claim of handicap or national origin discrimination upon which relief may be granted, Count I must be dismissed.

In order to survive a motion to dismiss under Rule 12(b)(6), the claim of retaliation set forth in Count II of the amended complaint must allege that the plaintiff engaged in protected activity, that the defendant employer took adverse action against him, and that a causal link exists between the protected activity and the adverse action. *Kachmar v. Sungard Data Sys., Inc*., 109 F.3d 173, 177 (3d Cir. 1997); *see also King v. Town of Hanover*, 116 F.3d 965, 968 (1st Cir. 1997) (setting forth identical elements in summary judgment context). Here, in the allegations of the amended complaint unaffected by the dismissal of allegations that were included in the December 1995 EEOC charge, the plaintiff alleges that he engaged in protected activity, Amended Complaint ¶¶ 8, 11, 16, and that the defendant took adverse action against him, *id*. ¶¶ 12-14, 17, 19-20, 23, 48. While some of these allegations are stated in conclusory fashion, others contain sufficient factual detail to meet First Circuit standards as set forth in *Miranda* and *Dartmouth Review*.

The defendant contends that the third necessary allegation, that a causal connection exists between the protected activity and the adverse actions, is missing from Count II. Motion to Dismiss and Incorporated Memorandum of Law (Docket No. 5) at 15.

> Cases in which the required causal link has been at issue have often focused on the temporal proximity between the employee's protected activity and the adverse employment action, because this is an obvious method by which a plaintiff can proffer circumstantial evidence "sufficient to raise the inference that her protected activity was the likely reason for the adverse action." We have stated, however, that where there is a lack of temporal proximity, circumstantial evidence of a "pattern of antagonism" following the protected conduct can also give rise to the inference. These are not the exclusive ways to show causation, as the proffered evidence,

looked at as a whole, may suffice to raise the inference.

Kachmar, 109 F.3d at 177 (citations omitted) (overturning trial court's Rule 12(b)(6) dismissal). *See also Ortez v. Washington County*, 88 F.3d 804, 809 (9th Cir. 1996) (same).

Here, the only specific protected activity alleged in the amended complaint occurred in 1990, Amended Complaint ¶¶ 11, 16, and the alleged adverse actions took place at unspecified times, with the exception of actions alleged to have taken place in 1990, *id*.¶ ¶ 13, 14, 17. This is sufficient temporal proximity to establish the causal connection for purposes of stating a claim, and nothing further is required at this time.

The defendant has also moved for summary judgment as to all counts. However, its Statement of Undisputed Material Facts ("Defendant's SMF") (Docket No. 6) includes no facts relevant to the retaliation claim, and the motion for summary judgment on Count II will therefore be denied. *See McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984).

B. State Law Claims

The defendant seeks dismissal of Counts III and IV of the amended complaint, which assert claims for intentional and negligent infliction of emotional distress respectively, on the grounds that the remedies provided by Title VII are exclusive and, in the alternative, that the amended complaint does not sufficiently allege the elements of such claims. "While it is true that the Plaintiff would be barred from receiving separate emotional damages for employment discrimination covered by Title VII . . ., it does not follow that the plaintiff is barred from recovering emotional distress damages for injuries distinct from the alleged Title VII . . . discrimination." *Caldwell v. Federal Express Corp*., 908 F. Supp. 29, 34 (D. Me. 1995). This is true even though the two causes of action arise from the

same series of events. *Id.* The defendant has also taken the position that all of the substantive paragraphs of Counts II and III must be dismissed because they were included in the initial complaint, which was based solely on the December 1995 EEOC charge, and all claims based on that charge must be dismissed as untimely. Defendant's Reply, Appendix at 7-8.

Counts III and IV of the amended complaint incorporate by reference allegations that were not raised in the initial complaint. The counts must therefore be construed to allege infliction of emotional distress by those actions. It is not possible to determine at this time whether the damages sought in these counts are for injuries distinct from the alleged Title VII discrimination. The amended complaint adequately alleges the elements of the causes of action. *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (elements of intentional infliction of emotional distress); *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996) (elements of negligent infliction of emotional distress). The motion to dismiss these counts must therefore be denied.

The defendant has also moved for summary judgment on these counts, but its Statement of Material Facts does not address the claims for infliction of emotional distress. Accordingly, the motion for summary judgment on Counts III and IV should be denied. *McDermott*, 594 F. Supp. at 1321.

Count V of the amended complaint alleges unjust enrichment as a result of the defendant's failure to pay the plaintiff for suggestions he made that were allegedly implemented by the defendant to its financial benefit. The defendant seeks dismissal of this count on the grounds that the factual allegations supporting it were all made in the December 1995 EEOC charge, that it seeks relief that is within the exclusive remedies of Title VII, and that federal courts lack jurisdiction over such claims, citing *Kroll v. United States*, 58 F.3d 1087, 1089 (6th Cir. 1995).

In *Kroll*, a Postal Service employee sought damages on theories of breach of contract and unjust enrichment for suggestions submitted under the Postal Service's Employee Suggestion Program which, he alleged, had been formally rejected by the employer when submitted but nonetheless implemented. *Id*. at 1089-90. The Sixth Circuit upheld the dismissal of the claims based on the lack of subject matter jurisdiction because the Employee Suggestion Program is governed by the collective bargaining agreement between the American Postal Workers' Union ("APWU"), of which the plaintiff was a member, and the Postal Service. *Id.* at 1090-91. The Sixth Circuit held that the Postal Reorganization Act, Pub. L. 91-375, establishes a comprehensive labor relations scheme that preempts any tort-based claim concerning an employee's submission under the Employee Suggestion Program. *Id.* at 1092 (adopting decision of district court, *Kroll v. United States*, 832 F. Supp. 199, 202 (E. D. Mich. 1993), which refers specifically to 39 U.S.C. §§ 1001-11, 1201-09).

In the instant case, the plaintiff does not dispute the defendant's assertion that he is a member of the APWU, that he submitted the suggestion or suggestions at issue pursuant to the Employee Suggestion Program, and that the Employee Suggestion Program is described in the defendant's Employee and Labor Relations Manual, which is incorporated by reference in the collective bargaining agreement between the APWU and the defendant. Declaration of Robert Hylen ("Hylen Dec.") (included in Docket No. 7) ¶ 4. The plaintiff attempts to distinguish *Kroll* on the basis of his assertion that the defendant accepted his suggestions, rather than reject them, Plaintiff's Opposition at 11, although this assertion is inconsistent with the allegations of the amended complaint, which merely allege that the defendant implemented the suggestions without suggesting whether it formally accepted or rejected them, Amended Complaint ¶¶ 24-31, 36-38, 63. At best, this is a distinction

that has no relevance to the Sixth Circuit's rationale in *Kroll*, which I find to be persuasive. Count V should be dismissed for lack of subject matter jurisdiction.[3]

Count VI alleges a breach of contract arising out of a settlement agreement effective December 23, 1992. Amended Complaint ¶¶ 18, 66-69. The defendant seeks dismissal of this count on the ground that the United States Postal Service gave the plaintiff the remedy he requested for this breach in 1995 and he did not file an appeal from that decision or file a court action concerning it within statutory time limits. The defendant also asserts that Title VII provides the exclusive remedy for such claims. The plaintiff concedes that the Postal Service, after finding that it had breached the settlement agreement, proceeded to re-investigate the charge upon which the settlement was based and that this investigation resulted in a right-to-sue letter "which gave rise to the current complaint." Plaintiff's Opposition at 12-13.

None of the authority cited by the defendant supports his claim that all breach of contract claims arising out of settlement agreements between the employee and the employer addressing charges of employment discrimination are preempted by Title VII, and my own research has unearthed none. Indeed, the amended complaint does not allege that the breach of the settlement agreement by the defendant resulted from discrimination based on national origin or handicap. While the amended complaint does allege that the breach "constitutes continuing evidence of the USPS' retaliatory animus" toward the plaintiff, Amended Complaint ¶ 19, that allegation alone does not compel the conclusion that the claim of breach of contract set forth in Count VI is simply a proxy

[3]In addition, it is clear that the allegations concerning at least one of the suggestions that are the subject of Count V were included in the December 1995 EEOC charge, Hylen Dec. ¶¶ 4-8, and any claim based on that suggestion must be dismissed for the reasons set forth above in my discussion of Count I.

for a claim of employment discrimination. The defendant is not entitled to dismissal of Count VI on this basis.

To support its alternate argument, the defendant relies on *Reidy v. Runyon*, 971 F. Supp. 760, 764 (E. D. N. Y. 1997), in which the court states: "Once an individual executes a valid settlement agreement, he cannot subsequently seek both the benefit of the agreement and the opportunity to pursue the claim he agreed to settle." However, in that case the settlement agreement had not been breached, and the issue was whether the employee's consent to the agreement was knowing and voluntary.[4] It is clear that the EEOC, upon finding that the defendant had breached the settlement agreement, remanded the matter for "further processing . . . commencing from the point at which processing ceased when the parties entered into the settlement agreement." USOC Decision, Appeal No. 01945619, Attachment 9 to Hylen Dec., at 4. As of the date of the EEOC decision, March 24, 1995, *id*. at 6, therefore, there was no longer a settlement agreement that could be enforced.

The plaintiff has not lost his underlying claim, at least to the extent that it was not raised in the December 1995 EEOC charge. He simply has to pursue it on the merits, rather than as a breach-of-contract claim arising out of the settlement agreement. As the defendant notes, the plaintiff requested that the settlement agreement be declared "null and void" when he complained to the EEOC of the defendant's breach of that agreement, thereby initiating the process that ultimately resulted in the right-to-sue letter that is one of the bases for this action. Letter from Marcel G. Larose, Jr. to EEOC, Attachment 8 to Hylen Dec., at 2. He cannot now complain that his route to

[4] Closer on its facts, although not directly on point, is *Kirby v. Dole*, 736 F.2d 661, 664 (11th Cir. 1984), in which the court held that one who agrees to settle his Title VII claim cannot subsequently seek both the benefits of the settlement and the opportunity to continue to press the underlying claim, even when the government had breached the settlement agreement.

legal relief does not include enforcement of that agreement.

The result of this analysis is that summary judgment should be entered for the defendant on Count VI rather than dismissal of that count, because the court has jurisdiction over a claim for breach of contract, and the count is adequately pleaded. The defendant has submitted an appropriately supported statement of material facts on this issue, Defendant's SMF ¶¶ 15-18, to which the plaintiff has not responded as required by Local Rule 56. The plaintiff has included in his memorandum of law in opposition to the defendant's motion a motion pursuant to Fed. R. Civ. P. 56(f) for additional time in which to conduct discovery in order to respond to any portion of the defendant's motion that will be treated as a motion for summary judgment, Plaintiff's Opposition at 7, but the affidavit submitted in support of that motion, Affidavit of Bruce B. Hochman, attached to Plaintiff's Opposition, is insufficient as a Rule 56(f) proffer. *Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994). In addition, the statement of what "Mr. LaRose [sic] expects discovery to turn up" on this issue that is included in the plaintiff's memorandum of law, Plaintiff's Opposition at 12, consists of factual assertions that could have been presented by affidavit without the need for any further discovery. The defendant's factual statements must be deemed admitted for purposes of the motion for summary judgment as to Count VI.

Even if the plaintiff's Rule 56(f) motion had been properly presented, the result would not be any different. The only relevant facts for purposes of my recommended decision on the motion for summary judgment as to Count VI are found in the EEOC decision, Hylen Dec. Attachment 9, and the plaintiff's letter to the EEOC, Hylen Dec. Attachment 8. These documents speak for themselves and the plaintiff could not controvert them through additional discovery. As noted previously, the plaintiff's concern with what the defendant did after receiving the EEOC decision

is still part of this action to the extent that the right-to-sue letter generated as a result of those actions forms a basis for Count II of the amended complaint.

The defendant is entitled to summary judgment on Count VI of the amended complaint.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED** as to Counts I and V of the amended complaint and as to any claims included in the plaintiff's December 1995 EEOC charge; that the defendant's alternative motion for summary judgment be **GRANTED** as to Count VI of the amended complaint; and that the defendant's motion be otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of December, 1997.

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David M. Cohen
United States Magistrate Judge